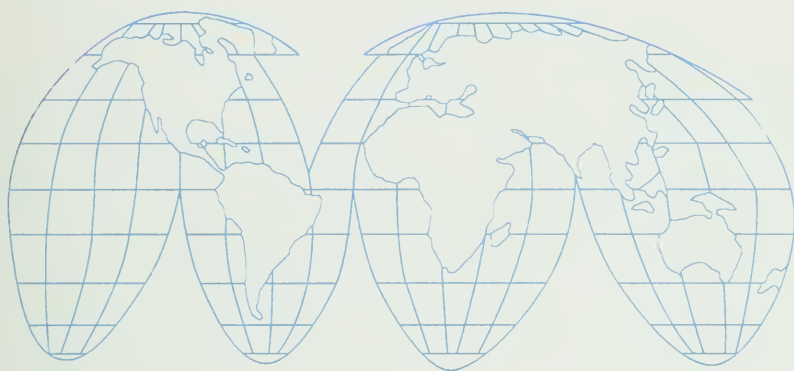


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FREEDOM, DEMOCRACY, AND HUMAN RIGHTS IN HONG KONG SINCE 1997: A HISTORICAL PERSPECTIVE

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During the one-and-a-half decades before the United Kingdom handed over government authority of Hong Kong to the People's Republic of China on July 1, 1997, a good deal of international attention was focused on the "megaphone diplomacy" around the constitutional development of the city state. The question then appeared to be how much Western-style democracy should be established in Hong Kong before and after the handover, with London wanting more and Beijing wanting less. Both supporters and critics of democratic reforms often took for granted that freedom, democracy, and human rights were British initiatives to bequeath a Western legacy to its former colony. The experiences and aspirations of Hongkongans themselves typically were not part of the international discussion since Hongkongans were assumed to be politically apathetic.¹ However, the developments in the Special Administrative Region (SAR) since 1997 cannot be understood without due regard for those experiences and aspirations.

¹ On the theme of the supposed political apathy of Hongkongans, see Lu Hongji, "Zhimindi jiaoyu yu suowei zhengzhi lenggan," *Ming Pao*, August 9, 1996.

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This paper will discuss issues and institutions of freedom, democracy, and human rights in Hong Kong, within the context of the longer term development of Hong Kong society and politics.

The Backdrop: British Colonial Set-up and Chinese Authoritarian Milieu

For more than a century after the British established colonial government in Hong Kong during the Opium War, there was very little constitutional development. The Executive and Legislative Councils were nominated or appointed by the governor, who in theory enjoyed almost absolute power in the government. There were no elections except in the Urban Council, which had very limited powers and was elected by a miniscule franchise. In the aftermath of the Second World War, Governor Mark Young proposed the introduction of elections to a municipal council with gradually expanded powers. However, the Young Plan failed to materialize because of the opposition of the local British and Hong Kong Chinese elites and because of the Cold War. While most of the rest of the British Empire underwent democratization and decolonization during the 1940s to 1970s, Hong Kong retained the constitutional framework of a nineteenth-century colonial government up to the 1980s. The government was not constitutionally accountable to the governed.

Administering "on borrowed time in a borrowed place," the British had neither the desire nor the capacity to aim for absolute rule. Rather, they had a limited agenda, encapsulated in the policy of "positive noninterventionism," to do the minimum necessary to maintain social order and political control, so as to generate the maximum economic benefit. Certain parameters were set for the population in order to contain the potential for partisan conflict (i.e., between the Chinese Nationalist and Communist parties) or for anticolonial action

(organized by either of those parties or arising from local frustrations). A series of laws was made in the 1950s to tighten the preexisting control. For instance, the Education Ordinance of 1953 and its subsidiary regulations prohibited any kind of political activity in schools, and any discussion of contemporary Chinese politics or of colonialism constituted a political activity. Other ordinances dating from the 1950s and 1960s gave power to the Government to close down a newspaper and imprison its publisher for a number of political offences, required any association to register with the commissioner of police, and made it potentially a criminal offence for any nine unrelated persons to assemble on the street.²

These laws severely restricted the civil liberties and political rights of the people, and made for a highly authoritarian regime. Schools and textbooks were regularly inspected for political censorship, people were charged and convicted for illegal association or illegal assembly, and some were deported to the Chinese mainland or to Taiwan for political offences. On a few occasions, newspapers were prosecuted; there were more instances when they were fined or warned to remain within the permissible limits.

By and large, Hong Kong people grumbled and stayed within the law. In the general context of East Asia in the 1950s and 1960s, Hong Kong still allowed more room for diversity of opinion and expression compared to the party dictatorships on either side of the Taiwan Strait. Being used to more stringent and arbitrary rule in the China of the emperors, the warlords, and the party dictatorships, many Hongkongans found credible the claims made by the local establishment media that Hong Kong was the "show window of democracy in

² A.E. Sweeting, *A Phoenix Transformed* (Hong Kong, Oxford University Press, 1993), 159. B. Luk, "Chinese Culture in the Hong Kong Curriculum," *Comparative Education Review*, 35 no. 4 (November 1991), 650-668. John D. Young, "The Building Years," in *Hong Kong between China and Britain*, M.K. Chan, ed. (Armonk, M.E. Sharpe, 1994), 131-47. Raymond Wacks, ed., *Civil Liberties in Hong Kong* (Hong Kong, Oxford University Press, 1988), especially chapters 5-8.

the Far East.” In fact, despite the restrictive laws, there was still plenty of space in the press and in daily life for free reporting and discussion of Chinese politics, Hong Kong issues, or world affairs, so long as one did not advocate or organize for the overthrow of the Colonial Government. That freedom was fully appreciated and utilized. In Hong Kong, one could find the full spectrum of Chinese political and philosophical convictions represented in speech and in print, along with a plethora of Chinese and foreign religious beliefs. The diversity was a basic fact of life and of the popular image of what Hong Kong was about.

Beyond this relative freedom of beliefs and expression, traditional Chinese ideas of hierarchical relationships and patriarchal authority still prevailed during those decades. Parents, teachers, and employers enjoyed power that was not to be disputed. Freedom from arranged marriage was still to be struggled for; physical punishment and verbal abuse from teachers was a daily occurrence in schools; employees were not protected from arbitrary dismissal or pay deduction, or from physical or sexual abuse by their bosses. Subordinates in any situation, especially women, often were victims. There was no appeal from such authority except to the “heavenly principles and the hearts of the people” (*tianli renxin*). Hongkongans in the 1950s and 1960s enjoyed a high degree of freedom, democracy, and human rights only relative to neighboring societies.

In the quarter-century after the Second World War, Hong Kong was an atomistic society of refugees suffering under grinding poverty and social inequities. The anachronistic Colonial Government, while energetically trying to cope with the worst problems of shortages of housing, sanitation, and education, was ill equipped to handle the popular frustrations. Three times major riots erupted: in 1956, 1966, and 1967.³

³ John D. Young, *ibid.* Teresa Ma, “Chronicles of Change, 1960s-1980s,” in the *12th Hong Kong International Film Festival: Changes in Hong Kong Society through Cinema* (Hong Kong, Urban Council, 1988), 77-82. Ian Scott,

The Star Ferry riots of 1966 prompted the Government to triple its education budget and review its social welfare policy. By the end of the 1960s, the Government had come to realize that its legitimacy to rule depended not on the “Unequal Treaties” signed in the last century with the emperors of China, but on what it could perform in that day and age for the people of Hong Kong. That realization, along with the coming of age of the children of the refugees, brought into being a new society and new government-people relations in the 1970s and 1980s, and fertile ground for democracy and human rights in the 1990s.

The Decade of Protests: Activists, Society, and Government

The Communist confrontation and riots of 1967 were the last major upheaval in Hong Kong society. The 1970s saw a series of peaceful civil protests that gave rise to highly significant though informal changes in the way Hong Kong was governed.

By 1971, Hong Kong had a local-born majority in the population for the first time in its history. The younger generation all had at least elementary schooling, and an increasing proportion had secondary or tertiary education. They also had developed a sense of belonging to the city where they were born and bred and made contributions. They felt they had the right to demand Hong Kong's improvement. Since political independence was never an option for Hong Kong, and this was always known, their demands focused not on political power, but on matters of social and economic substance. Successive protests and strikes during the 1970s, spearheaded by university students, primary school teachers, Christian crusaders, social workers, nurses, and trade unionists, gradually changed the tenor of Hong Kong society, not only by making

substantive gains, but also by creating a civil society within a plural community. The government developed in mutual accommodation with this expanding social space, so that while it retained political power and the formal structure of the old colonial regime, by the early 1980s, that power was exercised in a manner radically different from the early 1960s.⁴

The protests and strikes of the 1970s were basically peaceful and orderly. While many of them broke the laws of the time against illegal association and illegal assembly, they were characterized not by violence but by an increasing sense of purposefulness and self-discipline. In the process, Hong Kong became a less authoritarian and more open society, with a growing sense of freedom and human rights rooted in the community itself.⁵

The decade opened with the Chinese language movement among university students, which successfully demanded that Chinese be made an official language along with English.⁶ This movement, which targeted a symbolic as well as functional aspect of British colonialism in Hong Kong itself, was followed by another anti-imperialist protest. The Diaoyutai movement over the transfer by the United States to Japan in 1972 of a group of small islands in the East China Sea, which

⁴ Ian Scott, *ibid.*, 106-26. Nelson Chow, "A Review of Social Policies in Hong Kong," in *Hong Kong Society: A Reader*, ed. Alex Kwan, et al. (Hong Kong: Writers' and Publishers' Cooperative, 1986), 137-54.

⁵ Elizabeth Sinn, "60-Niandai Lishi Gailun," in *Hong Kong Sixties: Designing Identity*, ed. Matthew Turner and Irene Ngan (Hong Kong: Hong Kong Arts Centre, 1995), 80-83. M. Turner, "Hong Kong Sixties/Nineties: Dissolving the People," *ibid.*, 13-34.

⁶ On this and the following movements: P.K. Choi, "A Search for Cultural Identity: The Students' Movement of the Early 70s," in *Differences and Identities*, ed. A.E. Sweeting (Hong Kong: Hong Kong University Faculty of Education, 1990), 81-107; Hong Kong Federation of Students, *Xianggang Xuesheng Yundong Huigu* (Hong Kong: Wide Angle Press, 1983); Lu Hongji, "Xianggang Lishi Yu Xianggang Wenhua," in *Culture and Society in Hong Kong*, ed. Elizabeth Sinn (Hong Kong: Hong Kong University Press, 1995), 64-79; and B.K.P. Leung, *Perspectives on Hong Kong Society* (Hong Kong, Oxford University Press, 1996), chapter 7.

were claimed by protesters to be Chinese territory, again was organized by university students and widely supported in the community.

The anticorruption movement targeted institutionalized corruption in the Hong Kong police and other public agencies. Successful demonstrations organized by university students and church groups, involving tens of thousands of citizens, led the Government to establish the Independent Commission Against Corruption (ICAC) in 1974, to root out bribery in the police and other public sector agencies. The ICAC Ordinance also outlawed gift-taking by public officials, thereby marking a break with a venerable Chinese tradition, and redefined the relationship between holders of Government office and members of the public.

Throughout the 1970s, the Christian Industrial Committee and other church-related groups organized labor protests for less exploitative conditions, and encouraged the development of a labor movement independent of the Communist or Nationalist parties (whose labor unions in Hong Kong had been engaged in struggles against each other rather than for labor rights). A number of improvements to labor legislation resulted.

A successful elementary school teachers' strike led to the formation of the Hong Kong Professional Teachers' Union (HKPTU) and to improved processes for management-staff relations. This was followed by nurses's strikes. The HKPTU became the archetype for other white-collar unions, especially in the public sector. Blue-collar and white-collar unionism had implications far beyond union membership. By raising the public specter of rightful challenge against arbitrary authority of the employer or management, the sense of submissiveness in society at large was reduced.

The Golden Jubilee School affair of 1977-78 was the culmination of nearly a decade of peaceful protests. The principal of the high school was discovered by the students and teachers to have embezzled school funds. Their protests led to disci-

pline by Government school inspectors, which, in turn, led to an escalation of protests. As the situation escalated over the year, the Executive Council (the highest decision-making body of the Government) invoked the Education Ordinance to close the school. The students and teachers then held a peaceful and orderly public sit-in, which lasted for weeks, demanding a public investigation of their grievances and the reinstatement of their school. The community was split down the middle between those who supported the protestors and those who supported school authority. In the end, the Governor appointed a commission of inquiry. The commission apportioned blame evenly among the director of education, the school authorities, and the protestors, but to a large extent, vindicated the protestors. The Government relented from its earlier decision, and allowed them to have their own school.

In each of these instances, social protests were made through peaceful demonstrations (labeled “petitions”). Often the target of the protest was some aspect or policy of the colonial state itself. In many cases, the state made significant concessions to the protestors. Hong Kong society and its government both became more modern with a greater sense of belonging, of public participation, and of diversity of views and interests in peaceful debate rather than in violent confrontation. Numerous community groups and organizations emerged—professional and occupation groups as well as “pressure groups”—which advocated particular public policies. Prominent among these groups were students’, teachers’, and social workers’ unions. By the late 1970s, public forums and demonstrations were almost daily occurrences. Many of these were organized by the proliferating nongovernmental organizations; some led to the creation of such organizations. The community groups and organizations later became the nurseries for the prodemocracy political parties which emerged in the 1990s. Many of the leaders across the political spectrum of the 1990s had their first taste of public life as social activists in the 1970s.

The Government responded with what gradually became an institutionalized interface with the many activist groups. A protocol evolved for protests and demonstrations. While the ordinances against illegal association and assembly remained in the statute book, their application became more and more relaxed. Demonstrators were met not with riot squads or police harassment, but with police escorts to direct traffic and with Government officials to shake hands and receive the "petitions." The Government broadcaster, Radio-Television Hong Kong (RTHK), began to organize weekly forums and daily phone-in programs to discuss issues which concerned the public. These discussions, which often became quite heated and could be very critical of the Government, were broadcast live. More proactively, the Government expanded its system of consultation committees to cover all aspects of public policy, often coopting the vocal "pressure groups" to have their say at the committee table. It also published "green papers" for public debate on major policy initiatives, and took note of discussions in public forums and the press, as well as advocacy group submissions, when it reformulated its thinking in more definitive "white papers."

Meanwhile, Government interference with the press became more and more rare, and political censorship of textbooks and of school work was greatly relaxed. The rule about "no politics in school" remained in the statute book, but discussions regarding Chinese partisan politics and Hong Kong social and political issues took place frequently in high school history or social studies classes. The official syllabus of Chinese history in high schools, which during the 1960s concluded with the Republic Revolution of 1911, was extended by the 1980s to cover up to the 1970s (and by the 1990s, to cover up to 1989), with evenhanded treatment of both sides of the Taiwan Strait.

In this way, the civil society which grew up during the 1970s was institutionalized, and occupied ever-increasing space made available by the colonial state. While the constitutional

framework remained unchanged until 1985, the practice of government during the 1970s and early 1980s was less and less like the old colonial regime, and more as a locally-developed and increasingly open administrative state. In many ways, Hong Kong could be said to have been decolonizing without attaining a political identity.⁷

Constitutional Development, 1982–97

The introduction of district board elections in 1981 was a constitutional innovation initiated by the Government to interface further with the civil society. The boards were first elected in 1982 from a broad franchise, and although enjoying no real power, they were allowed to discuss any public issue that related to their districts. The Government promised that these elections would be followed in a few years' time by more elections to some of the seats in the municipal councils (i.e., the Urban Council and the newly created Regional Council), and then to a number of seats in the Legislative Council. Voting for legislators would be by "functional constituencies" of occupational groups in 1985, and by direct elections in geographical constituencies in 1988.

As the British prepared for negotiations with Beijing over the future of the territory in 1982, they apparently felt the need for the people of Hong Kong to have a greater say about their own domestic affairs. The granting of elections at that particular point was a British decision. But it is important to recognize that the elections were not a gift handed out to a docile, quiescent, and apathetic subject population. Rather, they were the natural next step for Hong Kong after a decade

⁷ Ian Scott, *Political Change*, chapter 4. Norman Miners, *Government and Politics in Hong Kong* (Hong Kong, Oxford University Press, 1982). Ambrose King, "Xingzheng Xina Zhengzhi," in *Xianggang Zhi Fazhan Moshi*, ed. Ambrose King, et al. (Hong Kong: Chinese University Press, 1985), 3-19. Steve Tsang, ed., *A Documentary History of Hong Kong: Government and Politics* (Hong Kong: Hong Kong University Press, 1995), 247-69.

of widespread and deeply-rooted social activism, to constitutionalize the hitherto informal interface between government and society.⁸

The Sino-British Joint Declaration of 1984, which resulted from the negotiations in Beijing, seemed to Hongkongans to have implied recognition by both metropolitan powers of the constitutional promises made by the Colonial Government. The people's general acquiescence to the Joint Declaration was given with such promises in mind. However, as soon as the Joint Declaration was ratified and the Hong Kong Government made moves in 1986 toward direct legislative elections for geographical constituencies in 1988, Beijing objected and London withdrew support. During 1986-90, when the Beijing-appointed committees to prepare the Basic Law for the post-1997 SAR Government set to work, grey areas within the Joint Declaration were exploited by the drafters to reduce the democratic promises which many people in Hong Kong believed to have been made in that document. The Basic Law, which was promulgated by Beijing in 1990, allowed less room for democracy than the 1981 promises, and gave more power for the SAR Government to control the society than had been exercised in practice by the Colonial Government for more than a decade. Strong protests were lodged by many community groups during the Basic Law drafting process and after the promulgation. Some of the groups soon developed into political parties for elections in Hong Kong.⁹

The Tiananmen prodemocracy movement and massacre in 1989 provoked massive popular responses in Hong Kong in support of the movement and against the repression. These responses grew at least in part out of Hongkongans' own frustrations with the stalling of democratization since the ratifica-

⁸ For details, see B. Luk, "The Rise of the Civil Society in Hong Kong," in *Human Rights and Democracy in Asia*, ed. Amitav Acharya, et al. (forthcoming).

⁹ M.K. Chan, "Democracy De-railed," in *The Hong Kong Reader*, ed. M.K. Chan, et al. (Armonk, M.E. Sharpe, 1996), 8-37. Ian Scott, *Political Change*, 268-305.

tion of the Joint Declaration.¹⁰ The British Government was prompted to rethink its policy about democratization in Hong Kong. A Bill of Rights Ordinance was enacted in 1991. Subsequently, most of the Draconian laws, which restricted freedom of expression, assembly, and association, and which had been applied in an increasingly relaxed manner since the 1970s but remained in the statute book, were now repealed or amended in a more liberal manner. The law courts also struck down or reinterpreted a number of ordinances in accordance with the Bill of Rights Ordinance. Elections by both functional and geographical constituencies were held in 1991 for the Legislative Council, which, however, still retained a number of seats appointed by the Governor. In 1992, the last British Governor, Christopher Patten, presented a constitutional package which exploited the grey areas in the Basic Law to restore some of the democratic promises implied in the Sino-British Joint Declaration. Beijing objected vehemently to the package. After protracted and unsuccessful negotiations with Beijing, the package was eventually enacted by the Hong Kong Legislative Council. Elections were held under it in 1995. This was the first time in which all the members of the district boards, the municipal councils, and the Legislative Council were returned by elections. The years 1995-97 saw the most vocal and open debates of public issues in the representative bodies.¹¹

From 1985 forward, prodemocracy candidates consistently enjoyed wide support in the district board, municipal, and Legislative Council elections. In every election during the 1990s, they won more votes and more seats than any other group, although they never held a majority of seats because of the

¹⁰ B. Luk, "The Beijing Democracy Movement and Hong Kong's Students and Teachers," in *The Other Hong Kong Report 1990*, ed. R.Y.C. Wong, et al. (Hong Kong: Chinese University Press, 1990), 391-94.

¹¹ Ian Scott, "Political Transformation in Hong Kong: From Colony to Colony," in *The Hong Kong-Guangdong Link: Partnership in Flux*, ed. R.Y.W. Kwok, et al. (Hong Kong: Hong Kong University Press, 1995), 189-219.

appointive and/or functional constituency elements in those bodies. Popular support for the advocates for democracy and civil rights was clearly evident. Many of the candidates of the prodemocracy parties won the support of the voters on their track records as social activists of the many protest or reform movements of the 1970s and 1980s.

State and Society at the Time of the Handover

By the time of the handover, Hongkongans had experienced nearly three decades of widespread social activism, at first for specific ameliorations of conditions in Hong Kong, and then for democracy and human rights in Hong Kong as well as in China. The million-strong marches in support of the Tiananmen movement in 1989, and the sustained massive annual commemorations of the massacre since then, have captured the imagination of the world. These demonstrations did not arise *in vacuo*. Rather, they resulted from the generation-old evolution of civil society. The elections to the representative bodies, and the parties which were formed to contest those elections, only gave formal political expression to that evolution. Without deep roots in an assertive and activist population, the package of last-minute elections introduced by Governor Patten would not have been able to survive the handover. However, the vibrant and maturing but amorphous civil society, without the political institutionalization brought about by the Patten package, also would not have been able to attain coherence.

Another significant development during the Patten era was the greater transparency of government. While he introduced an all-elected legislature, Governor Patten presided over an executive-led government; he did not deviate from the earlier Hong Kong tradition or from the Beijing-London requirement to "converge with the Basic Law." But by his own example and what he demanded of his officials, the processes and ratio-

nales of Government policies were made more transparent. Officials spent much time meeting with elected representatives and members of the public to receive suggestions in the formulation of policies, or to defend and lobby for support for those policies. Government and people were drawn much closer together. The people were made to feel that they enjoyed more respect from their government than ever before, and that they had some say in how they were governed. This more open style of governance was again a logical development from the Government's interface with the public which had been evolving since the 1970s, and was just as important for the institutionalization of freedom and democracy as the electoral reforms.

During the years leading up to the handover, despite the vociferous attacks by Beijing and its mouthpieces in Hong Kong on the Bill of Rights Ordinance and the Patten constitutional reforms, which upheld the specter of greater restrictions in the future, it was clearly evident that the civil society continued to expand. In 1996, it was estimated that there were on average three street demonstrations a day and numerous forums to discuss issues of public interest. The advocacy groups continued to proliferate. In addition to groups focusing on educational and social policy, there also were many new groups representing feminist, environmentalist, and human rights viewpoints.¹²

So at the end of June 1997, Hong Kong had a fledgling all-elected Legislative Council, as well as all-elected municipal councils and district boards. And the society had a strong sense of organized and self-disciplined assertiveness and of civil rights, nurtured over nearly thirty years. It also had ever-expanding freedom of opinion and pluralism of beliefs, enjoyed over five decades. This civil society faced the departure of a sovereign power that understood it had no legitimate

¹² See, for example, *Uncertain Times: Hong Kong Women Facing 1997* (Hong Kong: Hong Kong Women Christian Council, 1995).

claim to the territory, save by its performance, and the arrival of another sovereign power that believed it enjoyed ultimate and indisputable legitimacy by virtue of national reunification. While the two sovereign powers and their respective support groups held solemn ceremonies and gala performances, the popular mood seemed to have been one of subdued resignation. As alternatives to the official celebrations, many activist organizations stayed away from the colorful shows, and held somber seminars and street theater to reflect on Hong Kong's history and situation.

Constitutional Development, 1997–99

The two years since the handover have witnessed a tug-of-war between, on the one hand, the civil society and living expressions of freedom, democracy, and human rights, and on the other hand, the opposing notions of “social harmony” and “depoliticization” vocalized by Chief Executive Tung Chee-hwa, along with certain efforts to extend executive power. So far, civil society remains vibrant and vigorous, and manages to hold its own.

Following the handover, the SAR Government has been constituted according to the Basic Law promulgated by Beijing in 1990. The Basic Law provides for an executive-led government, with its Chief Executive and principal advisers appointed by Beijing. It also prescribes a Legislative Council of sixty seats. The first posthandover Council of two years' duration consists of twenty geographical constituency seats, thirty functional constituency seats, and ten seats filled by an Election Committee of eight hundred. The second Council (four years' term) will consist of twenty-four geographical seats, thirty functional seats, and six Election Committee seats, while the third Council (again for four years) will have thirty each of geographical and functional seats and no Election Committee seats. By the year 2007, a two-thirds majority of

the Council, with the consent of the Chief Executive, will be allowed to change the future composition of the legislature, say, into a chamber made up entirely of directly-elected geographical seats.¹³

Governor Patten's constitutional reforms followed generally the composition laid down in the Basic Law for the first post-1997 Council, in the hope that the Council elected in 1995 would be allowed to continue to sit after the handover (this concept was called the "through train"). However, PRC officials alleged that Patten's package reneged on secret agreements between London and Beijing, although they never explained how. They also perceived the resounding success of prodemocracy candidates and parties in the 1995 elections as grave threats to their designs for Hong Kong. Therefore, Beijing decreed that there would be no "through train" for the Hong Kong electoral system and representative institutions after the handover on July 1, 1997. Instead, it set up a "second stove," namely, a provisional legislature "elected" by an Electoral Committee of Beijing appointees, six months before the handover.

The Provisional Legislative Council (PLC) was made up of the 1995 Council minus almost all the popularly-elected members, who were replaced by former British appointees, pro-Beijing candidates who had lost in the 1995 elections, and political unknowns favored by PRC officials. The body began its deliberations across the border in Shenzhen months before the handover, and took over as the SAR legislature on handover night. At first, it was unclear how long Beijing intended the PLC's term to be. Intense international pressure preceeded the promise that new elections would be held for

¹³ The provisions are found in the Basic Law, Articles 67-69 and Annex II, as well as in the April 4, 1990, Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region appended to the Basic Law.

the first Legislative Council within a year.¹⁴

The legality of the Provisional Legislative Council and its acts was challenged in Hong Kong courts in the weeks that followed the handover, but it was upheld by the Court of Appeal in an obiter dictum. While the unseating of the elected Council was certainly a major setback for democracy, the extension of the effective function of the judiciary to rule on a fundamental political issue of the constitution was a significant affirmation of the separation of powers.¹⁵

Also within weeks after the handover, the SAR Government published the stipulations of the first Legislative Council elections to be held in 1998. The twenty geographical seats would be elected by proportional representation, a compromise between the first-past-the-post system favored by the prodemocracy parties, and the multi-seat, single-vote system favored by the pro-Beijing groups. The thirty functional seats would retain the twenty-one occupational categories in existence before the Patten reforms, and discard Patten's nine new categories which practically embraced every employed person. Instead, nine other (and much narrower) occupational categories were created. The overall effect was to reduce the total number of eligible voters for all thirty functional constituencies from over two million in 1995 to about 150,000 in 1998.¹⁶

The elections held on May 24, 1998, were open, clean, and fair, and a resounding victory for democracy and civil society, but they produced an undemocratic Legislative Council because of the artificially restricted constitutional framework. Voters turned out in record numbers, despite the tropical rain-storm that lasted for most of the day. One and a half million

¹⁴ Frank Ching, "Are Hong Kong People Ruling Hong Kong?" in *The Other Hong Kong Report 1998*, ed. Larry Chow, et al. (Hong Kong: Chinese University Press, 1999), 4-5.

¹⁵ Cf. Albert Chan, "Continuity and Change in the Legal System," in *The Other Hong Kong Report 1998*, *ibid.*, 44-45.

¹⁶ Cf. Frank Ching, "Are Hong Kong People Ruling Hong Kong?," 10. More details on the electoral system can be found in *Hong Kong 1998* (Hong Kong: Informational Services Department, 1999), 8-10.

voters voted in the direct elections of the geographical constituencies. The prodemocracy parties, i.e., the Democratic Party, The Frontier, and the Citizens Party, together won some 65 percent of the popular votes and captured more than two-thirds of the twenty geographical seats. The leading pro-Beijing party, the Democratic Alliance for the Betterment of Hong Kong (DAB) also ran a respectable campaign and won a few of the geographical seats. However, the majority of seats in the Council was won by candidates of the probusiness Liberal Party and of small pro-Beijing parties, who enjoyed little popular support, lost in all the geographical polls, but scored in the functional constituencies or in the 800-member Election Committee. Although the prodemocracy parties and independents also won a few of the functional seats, they constituted only about one-third (twenty seats) of the whole Council. The distance of the system from a representative democracy of one person, one vote, is self-evident from the following table.¹⁷

Legislative Council Election Results, 1998

Parties	Geographical Seats	Functional Seats	Election Committee Seats
Citizens	1	0	0
DAB	5	2	2
Democratic	9	4	0
Frontier	3	0	0
Liberal	0	9	1
Progressive	0	2	3
Other Parties & Independents	2	13	4
Total	20	30	10
(Voters	1,489,705	77,813	800)

¹⁷ Based on information from the Hong Kong Government website on the day following the elections, May 25, 1998.

The election was widely perceived in Hong Kong and abroad as a major success for the democratic process and for the political transition.¹⁸ It brought forth calls for a faster pace of democratization, such as to have the whole legislature elected by direct geographical constituencies before 2007. In the flush of its first major electoral victory, even the pro-Beijing DAB party joined in the chorus. However, Chief Executive Tung was not prepared to encourage any attempt to change the electoral arrangements in the Basic Law. But even he had to face the new politics when a new legislature with a large minority of popularly-elected members replaced the Provisional Legislative Council.

The first Legislative Council, whose term runs from 1998 to 2000, consists of a plethora of parties and independents. The Democratic Party is the largest, but it has fewer than one-quarter of the seats. On different issues, there are shifting alliances among the parties. The problem for any executive branch, whatever its own orientation toward democracy, is how to work with all these parties in order to govern. This problem is compounded by the different sources of legitimation and the lack of articulation between the executive branch and the legislature.

Chief Executive Tung was "elected" by an Electoral Committee of 400 members in 1996; that committee had been, in turn, selected and appointed by PRC officials, and enjoyed no mass base in Hong Kong.¹⁹ So, Tung is legitimated only by appointment from Beijing. Since his appointment, he has not made any attempt to build mass political support among the

¹⁸ Cf. Deborah Brown and James Robinson, "Hong Kong's 1998 Legislative Council Elections: Appraising Steps in Democracy," *The Asian American Review*, 27, no. 2 (Summer 1999): 27-71; Sonny Lo and Eilo Yu, "Election and Democracy in Hong Kong: The 1998 Legislative Council Election," unpublished research paper, Hong Kong University, 1999.

¹⁹ Basic Law, Article 45 and Annex I. Also, the April 4, 1990, Decision of the National People's Congress on the Method for the Formation of the First Government and First Legislative Council of the Hong Kong Special Administrative Region.

people, believing as he does in “social harmony” and “depoliticization” of Hong Kong. In contrast, the Legislative Council, or at least those of its members returned by the direct geographical elections or by the larger functional constituencies, claim legitimacy from popular mandate. Different sources of legitimation mean that if any major issue of contention should arise between Hong Kong and Beijing, the Chief Executive would be caught in the conflict. Even in strictly Hong Kong domestic issues, he cannot claim to have as much popular mandate as his critics on the Council.

One way to resolve the potential difficulties that could arise from the divergent sources of legitimation is for the executive to work with the legislators in such a way that the aspirations of the electorate could be brought into the policy-making process via the elected representatives, and at the same time, for the executive to partake of the popular mandate given to the legislators. A variety of ways to communicate between the executive and legislative branches could be adopted, such as by inviting the parties in the legislature with substantial popular support to join the Executive Council. However, this has not been done. On the contrary, apart from a few top civil servants, the Executive Council is composed of retired former British appointees, business leaders or pro-Beijing professionals, and a DAB politician who deemphasizes his party affiliation. As a body, it does not reflect popular aspirations and is insulated from the public mood and the electoral process. The Chief Executive makes few attempts to work with the legislature in other ways. He rarely appears in the chamber to explain or persuade, being content to have civil servants lobby for the passage of particular bills by constructing ad hoc alliances, often against the minority of legislators who enjoy majority voter support. These legislators are thereby cast into permanent opposition, which frustrates the popular will as well

as the work of the Council.²⁰

Tung seems to prefer to return to a style of governance akin to that of the colonial governors in the 1960s or earlier, before there were elections, and before there were so many different voices in society. If the elections introduced in Hong Kong during the last decade had been only a veneer to cover the British retreat, the polls and parties could have been brushed aside easily, and such a return under Tung's obviously sincere paternalism might have been possible. But given the long history of civil society, Hongkongans cannot be remade into the docile subjects of the 1950s. To create a government suited to the populace, the formal and informal interface between state and society which developed since the 1970s needs to be strengthened rather than weakened or set aside. Stalling democracy will make Hong Kong more difficult to govern, not easier—especially in a period of economic difficulty and restructuring.

Meanwhile, in the aftermath of the "bird flu" and other sanitation crises, the Administration proposed in late 1998 to reorganize local government by abolishing the two municipal councils and redistributing their functions among the bureaucracy, the district boards, and the legislature. This also can be seen as a setback for democracy, although, so far, it has not elicited very much response from society. However, the parties already are gearing up for the district board and Legislative Council elections to be held in late 1999 and 2000, respectively. The arrangements for the legislative elections will be broadly similar to 1998, but according to the Basic Law, there will be twenty-four geographical seats and only six Election Committee seats. This will be a small constitutional advance for democracy, and if the process remains fair and open as in 1998 (there is little reason to think otherwise), the popular element in the legislature may well increase slightly.

²⁰ Cf. Michael DeGolyer, "The Civil Service," in *The Other Hong Kong Report 1998*, 73-114.

And if the executive branch continues to fail to communicate with the legislature, the systemic political difficulties will be further compounded.

Freedom and Human Rights, 1997–99

Just as with democracy, civil liberties and human rights have been tested by the handover, but have remained alive and strong.

In April 1997, the office of the Chief Executive-designate issued a consultation document on *Civil Liberties and Social Order* which suggested a number of ways in which the rights of association and public demonstration ought to be restricted, including for reasons of “national security.” The document was widely criticized. After a period of consultation, the proposals were toned down.

So, when the Provisional Legislative Council proceeded to undo the liberalization undertaken earlier in the 1990s on the rights of assembly and association, the rollback was less than people’s worst fears. The resultant Societies Ordinance requires any association to be registered with the police, and gives the police the right to refuse registration on grounds of “national security,” which remains undefined. But so far, there has not been any perceptible change in practice. Organizations critical of the Hong Kong SAR and the PRC Governments, such as groups formed to support the Tiananmen movement, continue to exist and have not been banned. Similarly, the Public Order Ordinance requires organizers of public rallies to seek a “notice of no objection” from the police, which again could be refused on grounds of “national security.” But there does not seem to have been significant practical changes, with the police largely carrying on as before the handover, except when security tightened around visiting PRC dignitaries. For instance, on handover night, the police drowned out protests against Prime Minister Li Peng by play-

ing Beethoven on loudspeakers, but otherwise did not prevent the demonstrations. There continue to be numerous demonstrations, averaging three to four per day, including rallies of several tens of thousands like the annual June Fourth commemorations of the loss of life during the Tiananmen massacre, or smaller ones like the protest outside the New China News Agency against the suppression of Falun Gong in August 1999.²¹

An overview of legislation shows a general trend of liberalization of civil rights from the early 1990s through June 1997, then a number of reversals under the Provisional Legislative Council. The effect of the restored legal restrictions on civil liberties is to give wider discretionary powers to the police, which could be invoked to control popular associations or demonstrations if the Government decided it were necessary to do so. If the public opposition to the April 1997 consultation document had not been so loud, the rollback could have been more serious. But the intention to contain and restrict freedom of expression certainly is present, partly arising from Beijing's fear of Hong Kong as a "base of subversion" against the Chinese Communist Party, and partly from Chief Executive Tung's own predilections.²²

The Tung Administration's inclination to restrict freedom of expression is perhaps best symbolized by the changes made to the square on Lower Albert Road. From the 1970s until the handover, this open square between the buildings of the Central Government Offices was a favorite area for demonstrations, where the organizers could address a mass rally before a small delegation would walk up the short path to Government House to deliver its petition at the side gate. There never were

²¹ For example, *South China Morning Post*, June 5, 1998, 1; *Ming Pao*, June 5, 1998, A1; *South China Morning Post*, June 5, 1999, 1; *Ming Pao*, June 5, 1999, A1; *South China Morning Post*, July 29, 1999, 3. Cf. Christine Loh, "Human Rights in the First Year," in *The Other Hong Kong Report 1998*, 51-54; Albert Chan, "Continuity and Change," 32-35.

²² Cf. Kenneth Leung, "How Free is the Press of Hong Kong: 1997 and After?" in *The Other Hong Kong Report 1998*, 115-137.

any serious incidents. When Tung decided not to move into Government House and to work in the Central Government Offices instead, the buildings were renamed Government Headquarters, and the state emblem of the PRC replaced the colonial coat of arms on the main awning, while a smaller SAR emblem was affixed in a less prominent position, *and*, a nine-foot-high iron fence was built around the square. While demonstrations continue to be allowed on the now-enclosed square, the silent message is loud and clear.

In other areas of expression, attempts to restrict freedom also have met with strong opposition from the people. Almost immediately after the handover, David Chu, a pro-Beijing businessman and politician with a Harvard MBA, wrote to the presidents of two universities asking them to discipline some foreign professors who published newspaper articles critical of the PRC Government. This produced an immediate outcry both in Hong Kong and abroad. Chu apologized for the wording of his letters.²³

In March 1998, Xu Simin, a pro-Beijing publisher in Hong Kong and a member of the Chinese People's Political Consultative Conference, spoke in a session of the Conference in Beijing against Radio-Television Hong Kong (RTHK). He believed that RTHK, as a public broadcaster funded by the Hong Kong SAR Government, should act as a mouthpiece of the SAR and PRC Governments, and should not be allowed to criticize them. This again produced a huge uproar, since RTHK has maintained its editorial independence for many years, and has been seen as the most important member of the not-for-profit mass media, where all kinds of opinion can be aired. Xu's remarks, made within an august organ of the PRC state, was seen as an attack not only on RTHK and freedom of speech and of the press in Hong Kong, but also as a request for Beijing to restrict such freedoms in Hong Kong. The objections to Xu's remarks became louder when Chief Executive

²³ *Chronicles of Higher Education*, July 15, 1997.

Tung spoke in ambivalent terms which seemed to condone Xu. The public was assuaged only when Chief Secretary Anson Chan vehemently criticized Xu and defended RTHK's editorial independence, and when President Jiang Zemin told Hong Kong members of the PRC national organs not to interfere in Hong Kong's domestic affairs. This last episode was one of the instances when Beijing reiterated the "one country, two systems" policy and its public avowal for "Hong Kong people to rule Hong Kong."²⁴

The RTHK saga reoccupied center stage during the summer of 1999 when Cheng An-kuo, the quasi-official representative of Taiwan in Hong Kong, was invited by RTHK to speak on "Letter to Hong Kong," a popular current affairs radio program, and took the opportunity to explain President Lee Teng-hui's thesis of "special state-to-state relations." This led to cries of outrage from the pro-Beijing forces in Hong Kong, while RTHK stood firm and Government officials reiterated their support of the broadcaster's editorial independence. The transfer in October 1999 of Cheung Man-ye, RTHK's Director of Broadcasting, to be the new head of the Hong Kong Government office in Tokyo, has raised serious concern both in Hong Kong and overseas. Cheung, a popular and well-respected professional officer in the broadcast service, is seen by the community as a bulwark for press freedom. There is widespread public support for RTHK to maintain its practice of freedom and diversity, and not to succumb to pressure to become a propaganda machine. Once again, Anson Chan and the senior civil servants are perceived to be stronger guardians of Hong Kong's tradition of free expression than Tung.²⁵

In other ways, the Hong Kong SAR Government has shown pragmatic self-restraint with regard to public expres-

²⁴ Cf. Christine Loh, "Human Rights in the First Year," 58; Frank Ching, "Are Hong Kong People Ruling Hong Kong?," 18.

²⁵ For example, *South China Morning Post*, July 17, 1999; *Sing Tao*, July 29, 1999, A17; *South China Morning Post*, August 7, 1999, 2; and *Ming Pao*, August 10, 1999, A4.

sions which might arouse the ire of Beijing. For instance, on October 10, 1997, ROC flags hoisted in public places, such as pedestrian foot bridges, were removed, but those displayed on private property, although openly visible, were allowed to remain. News reporting on Taiwan and Tibet continues very much as before. In January 1998, two demonstrators who defaced PRC and SAR flags were fined by a magistrate invoking the PRC State Flag and State Emblem Law, one of the mainland laws specifically enacted by the Provisional Legislative Council to apply to Hong Kong. The case is being appealed.²⁶

A highly sensitive issue is the stipulation in the Basic Law (Article 23) that the SAR should legislate to prohibit sedition against the state. Since sedition is not an offense known to the common law tradition, and such legislation could have very serious ramifications for all kinds of civil liberties and rights in Hong Kong, the public is vigilant, and the SAR Government has not yet tabled any bill in that regard. During the summer of 1999, some pro-Beijing politicians suggested that it would be best to wait a few years, presumably with the hope that civil society would be more subdued by that time, so that a more stringent bill could pass through a more pliant Legislative Council.

Meanwhile, a technical issue in the wording of statutes already has aroused grave concern. In a number of Hong Kong ordinances enacted during the British colonial period, the Crown was exempted from certain restrictions. After the handover, the word "Crown" clearly was inappropriate. The Provisional Legislative Council adopted a suggestion by the Legal Department to substitute the word "State" for "Crown." However, the PRC state has, and increasingly will have, many tentacles and interests in Hong Kong, more than the British Crown ever did or could have. To exempt them from the specific restrictions in those Hong Kong laws could rebound on

²⁶ Cf. Christine Loh, "Human Rights in the First Year," 60.

the rights and freedoms of Hongkongans. In any case, to exempt state organs seems to contradict the provision in the Basic Law that mainland agencies and persons in Hong Kong have to obey Hong Kong laws. This is a difficult matter that will have to be tested in the courts. A case in point is whether the New China News Agency should be exempt from the provisions of the Privacy Ordinance if a Hong Kong citizen should demand to examine the files it keeps on her.²⁷

There are other concerns about freedom of expression on the horizon. For a number of years, fierce competition for market share among newspapers and other mass media resulted in often intrusive and unethical news gathering by reporters as well as paparazzi. Community unhappiness on this matter is substantial. However, a Law Reform Commission report in the summer of 1999 advocating a statutory press council to enforce ethical standards has prompted serious concerns about the specter of censorship. Media professionals propose instead other more autonomous approaches to professional ethics. While the debate continues, the transfer of Cheung Man-yeo cannot but exacerbate fears about the intentions of the Tung Administration.

Fierce competition among television stations has brought another kind of threat. In October 1999, Asia Television (ATV) the smaller of the commercial broadcasters, revamped its news programming by assigning two entertainers as news anchors and replacing serious news stories with tabloid items. This is widely perceived as not only a commercial gimmick, but also a further step along the path of "self-censorship" taken by the owners and management of the station, which recently came to include a number of prominent mainlanders.

Meanwhile, the PRC authorities across the border have shown their displeasure at a number of Hong Kong elected representatives by denying them access to the mainland. These included councilors and district board members belong-

²⁷ Cf. Albert Chan, "Continuity and Change," 37.

ing to the Democratic Party of Hong Kong, and the pro-democracy but independent Margaret Ng, who represents the legal constituency in the Legislative Council. While there is widespread public support for these Hongkongans' right to visit the mainland, Tung is evidently less sympathetic. This is seen by many as a signal for people to be less vocal in their advocacy for freedom, democracy, and human rights, and in their criticism of Beijing.

The single largest issue of human rights since 1997 had to do with the judiciary. The Basic Law includes within the definition of a Hong Kong permanent resident any child born of a Hong Kong permanent resident whether in Hong Kong or outside.²⁸ For decades, it was difficult for the mainland children of Hong Kong residents to join their parents in Hong Kong, because Beijing did not allow the pre-1997 Hong Kong Government to process applications for immigration from the mainland. Rather, the local public security bureaus in China issued one-way exit permits, and there was a good deal of corruption and red tape involved. In anticipation of the handover, a number of parents had their children smuggled into Hong Kong, and in early July 1997, demanded the right of abode for their children. The Provisional Legislative Council meanwhile passed a law requiring such children to be sent back to the mainland to apply for an exit permit from their locality as well as a certificate of entitlement from the Hong Kong Immigration Department. The two documents must be affixed together to be valid. The lawsuits went through the Court of First Instance, the Court of Appeal, and the Court of Final Appeal. The Court of Final Appeal ruled unanimously in January 1999 in favor of the children on the basis of their unequivocal right of abode in the Basic Law and the human right of family reunion. It also struck down as unreasonable

²⁸ The controversy and its background are discussed in detail in B. Luk, "Hong Kong and the Mainland—Citizenship and Right of Abode Issues," unpublished presentation at the Workshop on Hong Kong Post-Transition Issues, University of British Columbia, March 13, 1999.

and unconstitutional the ordinance requiring that two documents be affixed together. This decision raised a major constitutional crisis between the executive branch and the judiciary as well as between the SAR Court of Final Appeal in Hong Kong and the National People's Congress Subcommittee on the Basic Law in Beijing. The Subcommittee, following a suggestion from the Tung Administration, reimposed restrictions on the mainland children of parents in Hong Kong.

In spite of this setback for the judiciary, much remains to be done by the courts. Although the National People's Congress Standing Committee refused adoption of provisions in the Bill of Rights Ordinance which overrode other Hong Kong statutes, the Basic Law itself contains an enumeration of civil rights. So it will still be up to the courts to test past and future legislation and Government acts.

Long-Term Prospects

Two years and a few months is not a long enough time for Hong Kong's political transition to play out. Civil society is alive and well and growing in Hong Kong. But unlike the 1970s and 1980s when the state and civil society grew together in creative tension, the post-1997 Administration appears to be preparing to restrict and turn back civil society. What will happen with this clash of wills remains an open question. Much will depend on the values and ideas of the younger generation of Hongkongans as they mature. Already, there are efforts by certain policy makers in the education field to require the PRC flag to be raised in Hong Kong schools, although the UK flag almost never was flown; however, there is little public sentiment in support of such political rituals in Hong Kong. Also, all the Chinese history textbooks for high school use were changed immediately after the handover to reflect Beijing's current point of view, especially with regard to the development of the mainland, Taiwan, and Hong Kong in

the last fifty years. How these and other pedagogical changes will be received remains to be seen.

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